No. 158.

Brief of Simkins for Appellee

Filed Dec. 2, 1897.

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Supreme Court of the United States,

October Term, 1897.

Building and Loan Association of Dakota,
Appellant,

vs.

M. S. PRICE, Et Al.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

BRIEF FOR APPELLEE.

THE SAMUEL JONES COMPANY, DALLAS.

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BRIEF FOR APPELLEE.

There is no Federal question involved in the record before this Court. The questions for the Circuit Court were: 1st. Does the bill show more than $2,000.00 in controversy, exclusive of interest and costs. 2d. Does the bill show any facts sufficient to invoke any consideration in equity?

Here the bill exhibits a contract, the material facts recited in which this Court must judicially know to be false, because the geographical separation of Dakota and Dallas render their *truth* impossible, except upon the theory that the whole blank formula were *with* and filled up by the Dallas agent.

The conditions of the bond are *impossible* of performance, and therein the bill shows upon its face that

performance was not contemplated by appellant at the time of execution, and that the whole was but a device to disguise the real transaction, which was a simple loan of $1,756.00, because the bill makes the by-laws a part, and they require (a fact undisputed) $204.00 off, and $40,00 membership fee, thus withholding $244.00 from the $2,000.00 it alleges

The bill alleges (p. 1 Record) on January 1st, 1890, an application for membership, subscription for stock, an *issue* of stock and payment of subscription or admission fee on 3rd page of bill, p. 2 Record, it alleges on said 1st day of January, 1890, an application for advancement of $2000. and a bid as a premium of $50. per share of stock and offered the real estate in Dallas, Texas, as security. The bill shows all these alledged cotemporaneous acts were in fact but one *act*, a mere formula required by appellant as a condition precedent to a loan. Page 4 alleges a $4000. bond which shows a premium of $2000. bid in accordance with the by-laws (a copy which by the allegations of the bill it is proper for the Court to consider) which shows on page 12 under the head of "loans" that six full monthly payments were deducted, which, with $40. membership fee, reduced the actual loan to $1756.

This bond executed February, 1st, 1890, shows a *sale* and assignment to appellant of the 40 shares of stock (p. 3 Record, par. 5.) conditioned to pay $4000. in 9 years with interest on $2000 at 6 per cent. equals $5,080; or to pay monthly in advance, interest on $2,000, equals $10. and $24. as stock dues, until the stock payments equals $100. per share, 40 shares equals $4,000; and shall then *surrender* said stock to appellant, in default of which performance the whole amount shall become due as *liquidated damages*. To mature

the stock, requires by the terms of the bond 13 years, 10 months and 20 days; during which time interest on $2,000. at 6 per cent. equals $10. per month must be paid, equals $1,566.66 interest, aggregating $5,566.66 to be paid for the use of $1,756.

The bill nowhere alleges any possession, ownership, control of, or beneficial interest by Rothschild in the stock after the loan, nor, that it had any value or could become of any value until matured by *payment to par*, when it dies by the act of its creation. It has been *sold* to appellant and is surrendered to it upon maturity. It has no real, tangible, appreciable existence. It is apparent upon the face of the bill as a fictitious coffer or receptacle for profit for use and forbearance of a loan of $1,756.

No facts are set up in the bill by which appellant could suffer any damage except from the detention of the loan, and there is no allegation that simple interest would not, most abundantly, repair that. The question was not one of usury, or who may plead it, but whether such extraordinary exactions as are exhibited in the bill are not now and have always been held by the United States Courts to be interest, whether the premium was in the nature of interest, the bill shows payment of $1,200 *stock dues* and $500 interest, equaling $1,700, and nowhere alleges that the return of $1,700 of the $1,756 gave any *value* to the stock.

On page 6 of the Record the bill shows that C. S. Crysler was a citizen of Dallas, Texas, as well as all the parties except appellant.

The bargain shown in the bill is too unconscionable to be enforcable in equity.

In support of the proposition that the premium of $2,000 in this bill is interest, we cite the following au-

thorities: (Sec. 6, page 57, Laws of Dakota), "no premiums, fines or interest shall be deemed *usurious.*" There are no usury laws in Dakota, and this Statute shows the legislative construction to be that the *premium* is *interest.* In Fowler v. Equitable Trust Co. 141 U. S., p. 384, on page 404 the Court say: "The Statute cannot be avoided by any device or shift." On page 405 "we therefore hold that the exaction by the Trust Company's agent, pursuant to his general arrangement with it, of commissions over and above the ten per cent. interest stipulated to be paid by the borrower, rendered the contract usurious." Here the *commission* is by the highest authority held to be interest.

On page 406 *idem*, the Court say "a borrower being sued may have all interest payments applied in diminution of the principal sum."

In Miller v. Tiffany, 1 Wall 298, the Court say on page 310 "the parties must act in good faith and not disguise the real character of the transaction."

In Andrews v. Pond, 12 Peters 65, on page 76 the Court say: "If any part of the 10 per cent. exchange was intended as a cover for usurious interest, the form in which it was done will not protect the bill from the consequences of usurious agreements."

In Bank v. Owens, 2 Peters 535 to 536, the Court say: "Accepting depreciated Kentucky bills as a loan at par is usurious interest."

In Missouri Valley Ins. Co. vs. Kittle et al, 2 Fed. R., on page 114, the Court say: "The charge of usury, says Mr. Tyler, in most instances, attaches to pretended cases of exchange of credits or commodities, or when a profit is realized for something else besides the

use of money loaned or debt forborne." (Tyler on Usury, p. 105.) The disguise here was life insurance.

In Krumseig et ux vs. Missouri, Kansas, &c., 77 Fed. Reporter, p. 32, the disguise was life insurance. The Court held, in both cases, the premiums paid were interest on a loan. The transactions are similar to the bond in this bill, but less onerous. Tyler ou Usury, p. 83: "And, perhaps, it might be added, that when a contract is made payable at a place other than the residence of either of the parties, and foreign to the subject matter of the contract, and a higher rate of interest is contracted for than the laws of the place permit, the parties will be presumed to have intended a fraudulent evasion of those laws."

In Griffin vs. Building and Loan Ass'n of Dakota, 39 S. W. Reports, p. 659: Considering a bond identical with the one on which this bill was brought, the Supreme Court of Texas say: "The fact that the contract expresses that the money borrowed is to be paid in Dakota, is met by the real, substantial provisions for its enforcement in Texas, and the circumstances under which the business was transacted with such overwhelming force that we are brought to the conclusion that the contract, so far as it provided by its terms for the payment of the money in Dakota, was simply a device to evade the laws of this State, and these facts are so manifest from the face of the papers themselves, that it ceases to be a question of fact, but becomes a matter of law. The contract was made with a view to its enforcement in Texas."

In Simpson v. Kentucky Citizens Building & Loan Association, 41 Southwestern Report 570, the Court say: "The dues and premiums we have invariably held to be interest." On page 573, for the plain words

borrow, loan and interest, "sale," "advance," "bonus" and "premium" are substituted.

In Mills v. Association, 75 N. C. 299, the Court said: "calling a borrower a "partner," or substituting "redeeming" for "lending," or "premium" for "bonus," or "dues" for "interest," and such like subterfuges will not avail."

It is most respectfully submitted that the "premium" in this bill is *interest* pure and simple, and the stock wholly fictitious, having not one single indicia of real tangible appreciable existence as property; it is a device pure and simple, both of which facts are apparent upon the face of the bill.

In Lloyd v. Scott, 4 Peters 205, on page 230 the Court say "the purchaser of the property charged with the annuity may plead usury; the annuity was the concealment of usury. This is the law in Texas.

The case of Vaughn, 36 Southwestern Report 1014, the Court say: "Vaughn having paid no part of the purchase money, the plea of usury could not avail him to set aside the sale.

It is respectfully submitted the judgment of the Circuit Court is sustained by the overwhelming weight of authority, English and American, State and Federal.

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for Appellees.

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